CORRECTED COPY

Office - Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

Princeton University and State of New Jersey,

Appellants,

v.

Chris Schmid,

Appellee.

On Appeal from the Supreme Court
of New Jersey

BRIEF OF APPELLEE CHRIS SCHMID

Jerrold Kamensky
Tomar, Kamensky & Smith, P.A.
194 South Broad street
Trenton, New Jersey 08608
(609) 394-8585
Counsel of Record
For the American Civil Liberties
Union of New Jersey

Sanford Levinson
University of Texas Law School
727 East 26th Street
Austin, Texas 78705
For the American Civil Liberties
Union of New Jersey

Attorneys for Appellee
Chris Schmid

Of Counsel:
Douglas Laycock
University of Texas Law School
727 East 26th Street
Austin, Texas 78705

SERRAO ASSOCIATES, INC.
Trenton, New Jersey 08618
(609) 883-7979

QUESTIONS PRESENTED

1. Whether the owner of private property has standing to appeal a decision overturning a criminal trespass conviction, where the basis for the decision is the inability, under the State constitution, of the property owner to invoke state trespass law against certain expressive activities by members of the general public on his property, and where the State does not and cannot lodge a genuine appeal before this Court.
2. Whether the "academic freedom" protected by the First Amendment includes an affirmative duty by the State to allow its trespass law to be used in behalf of an unfettered right by a university to control access to its campus, even in the face of a requirement of the State constitution that its criminal trespass law cannot be available in particular circumstances.

Table of Contents

Questions Presented i
Table of Contents ii
Table of Authorities iii
Caption 1
Statement of the Case 2
Summary of Argument 5
Argument —
I. The State of New Jersey is not genuinely appealing the decision below, and Princeton University is without standing to appeal on its own 6
A. There is no "case or controversy" between the State of New Jersey and either of the other litigants in this case, nor does the State of New Jersey have any Federal claims to raise before this Court 6
B. Princeton University is not a "party" to this criminal case and is therefore without standing to appeal the decision of the court below 8
C. The case is moot as between Princeton University and appellee 12
D. Princeton is without standing to assert the claims of other universities in other settings ... 12
II. There is no state action in the case sufficient to allow Princeton University to assert claims under the First, Fifth, or Fourteenth Amendments ... 15
III. "Academic freedom," however much protected by the First Amendment, is not a genuine issue in this case, and Princeton University's invocation of absolute dominion over its campus is alien both to "academic freedom" and to relevant case law .. 18
IV. The standard articulated by the New Jersey Supreme Court is clear and survives any test established by the "void for vagueness" doctrine . 36
V. The States are free to protect individual liberties even where the First Amendment arguably does not, and the New Jersey Supreme Court's construction of its own constitution violates no right of Princeton University 39
Conclusion 42

Table of Authorities

Cases	Page
Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977)	30
Adler v. Board of Education, 342 U.S. 485 (1952)	18
Aetna Life Insurance Co. v. Haworth, 300 U.S. 229, 240-241 (1937)	7
Associated Press v. United States, 326 U.S. 1, 20 (1945)	29
Baggett v. Bullitt, 377 U.S. 360 (1964)	38
Bailey V. Patterson, 369 U.S. 31, 33 (1962)	11
Bell v. Maryland, 378 U.S. 226 (1964)	16
Bigelow v. Virginia, 421 U.S. 809, 826 (1975)	38
Branzburg v. Hayes, 408 U.S. 665 (1972)	30
Broadrick v. Oklahoma, 413 U.S. 601, 610-611 (1973)	14
Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)	27
CBS v. F.C.C., ___ U.S. ___, 101 S. Ct. 2813, 2830 (1981)	28,32
Civil Rights Cases, 109 U.S. 3 (1883)	15
Connally v. General Construction Co., 269 U.S. 385, 391 (1926)	38
Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 634-39 (1819)	26
Eastex, Inc. v. N.L.R.B., 437 U.S. 556 (1978)	32
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)	15,17
First National Bank of Boston v. Bellotti, 435 U.S. 765, (1978)	28,29
Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)	28
Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)	37
Healy v. James, 408 U.S. 169 (1972)	25,27
Herbert v. Lando, 441 U.S. 153 (1979)	31
Holland Rantos Co., 234 N.L.R.B. 726, *enforced* 583 F.2d 100 (3d Cir. 1978)	32
Hudgens v. N.L.R.B., 424 U.S. 507 (1976)	15,16,32
Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610 (1976)	38

Cases	Page
Linda R.S. v Richard D., 401 U.S. 614 (1973)	10
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 91 (1977)	38
Lloyd v. Tanner, 407 U.S. 551 (1972)	16
Lombard v. Louisiana, 373 U.S. 267 (1963)	16
Marsh v. Alabama, 326 U.S. 501 (1946)	16,27,28
McGowan v. Maryland, 366 U.S. 420, 429-430 (1961)	14
Metromedia, Inc. v. City of San Diego, 49 Law Week 4928 (July 2, 1981)	38
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	29,30
Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)	28
Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971)	7
Murdock v. City of Memphis, 20 Wall. 590 (1875)	7
New Hampshire v. Louisiana, 108 U.S. 76 (1883)	7
New York Times v. Sullivan, 376 U.S. 254, 266 (1964)	29,30
Oklahoma ex rel Johnson v. Cook, 304 U.S. 387 (1938)	7
Peterson v. Greenville, 373 U.S. 244 (1963)	16
Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376	31
Poe v. Ullman, 367 U.S. 497, 501 (1961)	11
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	30,35,39,40
Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969)	31,32
Schad v. Mt. Ephraim, ___ U.S. ___, 101 S.Ct. 2176, 2181 (1981)	14,33,37
Scott Hudgens, 230 N.L.R.B. 414 (1977)	32
Smith v. Goguen, 415 U.S. 566 (1974)	38
South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)	7
State v. Miller, 83 N.J. 402, 411, 416 A.2d 821 (1980)	29
Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)	23
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969)	26

Cases **Page**

United States v. Nixon, 418 U.S. 683 (1974) 31
United States v. Sherman, 581 F.2d 1368 (1978) 10
University of California Regents v. Bakke, 438 U.S. 265 (1978) 18,22
West Virginia Board of Education v. Barnette, 319 U.S. 624, 637, 640-42 (1943) 30
Wooley v. Maynard, 430 U.S. 705 (1977) 30
Younger v. Harris, 401 U.S. 31, 33 (1962) 10
Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 31

Constitutions, Statutes and Court Rules

United States Constitution, First Amendment. 5,14,18,21,37
United States Constitution, Fifth Amendment 5
United States Constitution, Tenth Amendment 5,28
United States Constitution, Fourteenth Amendment ... 17
42 U.S.C. §1983 17
New Jersey Constitution, art. I, para. 6 4
New Jersey Constitution, art. I, para. 18 4,36
Rules Governing the Courts of the State of New Jersey, Rule 4:33-1 9
Rules Governing the Courts of the State of New Jersey, Rule 4:33-2 9
Rules Governing the Courts of the State of New Jersey, Rule 7:4-4(b) 9

Other Authorities

R. Hofstadter and W. Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955) 19
R. MacIver, ACADEMIC FREEDOM IN OUR TIME (1955) 19
L. Veysey, THE EMERGENCE OF THE AMERICAN UNIVERSITY 384-418 (1970) 19,20
E. Pincoffs, ed., THE CONCEPT OF ACADEMIC FREEDOM (1972) 19

Other Authorities **Page**

Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in E. Pincoffs, ed., THE CONCEPT OF ACADEMIC FREEDOM (1972) 19

Developments in the Law — Academic Freedom, 81 HARV. L. REV. 1045 (1968) 19

L. Joughin, ed., ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (1969) 20

Carroll, THROUGH THE LOOKING GLASS (1871) . 21

F. Machlup, *Some Misconceptions Concerning Academic Freedom*, 41 AAUP BULLETIN 753 (1955) . 20,21

R. Fuchs, *Academic Freedom — Its Basic Philosophy, Function, and History*, in L. Joughin ed., ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (1969) 25

No. 80-1576

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

Princeton University and State of New Jersey,

Appellants,

v.

Chris Schmid,

Appellee.

On Appeal from the Supreme Court
of New Jersey

BRIEF OF APPELLEE CHRIS SCHMID

Statement of the Case

Princeton University ("Princeton") is a private, non-profit, and primarily residential educational institution. J.S. 49a, 52a-53a.[1] Approximately 3,725 undergraduates live in dormitories or other housing located on that part of the campus known as the "central campus," which, though bounded by public streets, is entirely Princeton's property.[2] J.S. 52a-53a. Undergraduates may not live in non-University housing without receiving permission from the Dean of Student Affairs. J.S. 59a. Not only must most students live on the central campus; all members of the first- and second-year classes must hold a meal contract at a University-owned dining facility, and approximately 1,672 (75%) of these undergraduates take their meals at facilities located on the central campus, as do approximately 248 (11%) of the third- and fourth-year students. J.S. 53a-54a.

Approximately 87% of the student body are citizens of the United States, 18 or over, and therefore eligible to register to vote under the 26th Amendment to the United States Constitution and the laws of New Jersey or other states. Approximately 1500 of these students are registered to vote in the Borough or Township of Princeton. J.S. 54a.

On April 5, 1978, appellee Chris Schmid, a member of the United States Labor Party, entered the grounds of the central campus of Princeton University for the purpose of distributing material to the voters living on the Princeton campus. Such material involved both a campaign for political office being conducted by the Party and the positions of the Party in general. J.S. 1a. Although there is no evidence whatsoever that appellee was in any way disorderly or otherwise disrupted the

---

[1] "J.S." refers to the Jurisdictional Statement filed by Princeton University on March 17, 1981; "J.A." to the Joint Appendix.

[2] Approximately 457 undergraduates live in other Princeton-operated housing, and 266 live in non-University housing.

operations of Princeton University, he was nonetheless arrested by a member of the Princeton University Security Department and charged with violating New Jersey's general trespass statute.

Although Princeton University had issued to the public a blanket invitation to attend lectures, cultural performances, and other events designated as open to the public, J.S. 29a, the University at that time had a policy whereby members of the public who wished to distribute material on campus had to receive permission from University officials. No standards were listed structuring the granting or denial of permission. J.S. 2a. Appellee Schmid had been denied permission on at least one earlier occasion, and he had not sought permission for his entry onto campus on April 5. J.S. 50a. Princeton University has subsequently revised its regulations concerning access by off-campus individuals or organizations, and current regulations allow access to individuals acting on behalf of candidates for public office or of *bona fide* religious organizations, subject to time, place, and manner restrictions. J.S. 2a-4a.

Appellee Schmid was tried for trespass in Princeton Borough Municipal Court on June 8, 1978.[3] On October 20, 1978, the trial judge delivered an opinion convicting appellee and fining him $15 plus $10 costs. A trial *de novo* on the record by the New Jersey Superior Court, Law Division, on February 20, 1979, also resulted in conviction, and the same fine was imposed. While appellee's appeal to the New Jersey Superior Court, Appellate Division, was pending, the New Jersey Supreme Court directly certified the appeal. That Court, on November 25, 1980, delivered an opinion reversing appellee's conviction. Applying a test taking into account "(1) the nature,

---

[3]The statement in the Princeton Brief, at 4, is in error. Judge Carchman's written decision was handed down on October 20, 1978, but the trial was earlier.

purposes and primary use" of Princeton University, "(2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property," J.S. 27a, the Court found appellee's conduct to be protected by Article I, paragraphs 6 and 18 of the New Jersey Constitution, which guarantee, respectively, freedom of speech and "the right freely to assemble together, [and] to consult for the common good."

Summary of Argument

1. The State of New Jersey is wholly without standing to participate as an appellant in this case, for it can point to no Federal right of the State *qua* State that was infringed by the New Jersey Supreme Court's construction of the New Jersey Constitution. This case therefore represents an unprecedented attempt by a private litigant, Princeton University, to appeal the setting aside of a criminal conviction; Princeton is without standing to challenge the decision of the New Jersey Supreme Court before this Court.
2. Princeton can assert whatever First, Fifth, or Fourteenth Amendment rights it has only against invasions of those rights by the State of New Jersey. The State of New Jersey has in no way invaded those rights by the mere refusal to prosecute the actions of a private citizen.
3. Princeton's version of that "academic freedom" protected by the First Amendment stands the traditional history of academic freedom on its head and distorts the relevant case law invoking that concept. What Princeton University is defending is not "academic freedom," but the absolute dominion of university administrators over every idea that might reach students' minds, whether from the classroom or elsewhere. Appellee concedes that the First Amendment protects "academic freedom" against invasion by the State, but that freedom is in no way contravened by the decision of the New Jersey Supreme Court.
4. The standard articulated by the New Jersey Supreme Court to apply to this and future cases is a careful statement of the various factors that must be taken into account and in no way is subject to invalidation as being "vague".
5. The 10th Amendment to the United States Constitution allows the States to do what they think necessary to safeguard the "republican form of government" that is the essence of our constitutional democracy, and the decision

of a State should be set aside only in the face of compelling evidence that it threatens rights protected by the United States Constitution. Princeton University can point to no evidence whatsoever that its constitutional rights are affected by the decision of the New Jersey Supreme Court.

I. THE STATE OF NEW JERSEY IS NOT GENUINELY APPEALING THE DECISION BELOW, AND PRINCETON UNIVERSITY IS WITHOUT STANDING TO APPEAL ON ITS OWN

A. *There is no "case or controversy" between the State of New Jersey and either of the other litigants in this case, nor does the State of New Jersey have any Federal claims to raise before this Court.*

This case concerns a conviction for criminal trespass which was overturned by the New Jersey Supreme Court. That Court construed the free expression guarantees of the New Jersey State Constitution to prohibit application of the State's general trespass statute to appellee in the circumstances of this case.

Although the State has lent its name to this case as an appellant, its own Brief emphasizes that the "State of New Jersey deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action." Brief of the State of New Jersey 4. It seems most unusual to label an "appeal" a statement by the State in whose name the criminal law is invoked and whose Constitution is at issue in this case that it has no opinion about the validity of its own law. Indeed, since the State of New Jersey so specifically disclaims its having a "case or controversy" with either of the other named litigants, jurisdiction is lacking under the most fundamental interpretation of Article III of the United States Constitution, which requires that litigating parties actually have adverse interests. See, e.g.

Moore v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 229, 240-241 (1937).

Similarly fundamental is the fact that New Jersey has no Federal claims it can assert before this Court. Even if the Attorney General of New Jersey believes that the New Jersey Supreme Court misconstrued the New Jersey Constitution, that is obviously not a proper subject for this Court's contemplation. *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). The Attorney General, if this appeal were proper, would have to point to a provision of the United States Constitution that protects the State of New Jersey from itself — i.e., its own Constitution. New Jersey itself cannot assert the loss of *its* First Amendment rights, whatever that might mean, because the New Jersey Supreme Court interpreted the State Constitution to protect appellee's freedom of expression. Nor can any other Federal right be pointed to. Does the government of New Jersey have a protected Federal right against a limiting construction of state law by the State Supreme Court? Does the Federal Constitution confer power on the New Jersey legislature — power not subject to control by the people of New Jersey in their State constitution? To ask such questions, in the American legal system, is to answer them.

Nor can the State gain standing by asserting itself as representing *parens patriae* those citizens of New Jersey who might wish to challenge the constitutionality of the New Jersey Constitution under the United States Constitution. "A state is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. See *Oklahoma ex rel Johnson* v. *Cook*, 304 U.S. 3876 (1938); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883)." *Maryland* v. *Louisiana*, ___ U.S. ___, 101 S.Ct. 2114, 2124 (1981). See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966).

There appears to be no previous case where a State has come to this Court for a declaration that its own Constitution, as

construed by its highest Court, is unconstitutional under the United States Constitution. Appellee suggests that this fact exemplifies not only political prudence, but the much more fundamental point that it is almost impossible to imagine how such a case might ever properly arise. When the State notes that it would be "inappropriate" to join Princeton in attacking the validity of its own constitution, it was being more than polite; it was recognizing the impossibility of its assuming the role of a genuine appellant in this case.

The State of New Jersey should be dismissed as a party to this case. Or, if dismissal would be an anomaly given that the validity of New Jersey's constitution is the core issue of this case, this Court should realign the parties. The State should be joined with appellee Schmid, who defends the validity of the New Jersey Constitution, rather than with appellant Princeton, which calls on this Court to assert Federal supremacy over the commands of the State constitution.

B. *Princeton University is not a "party" to this criminal case and is therefore without standing to appeal the decision of the court below.*

Dismissal of the State (or realignment) would not end this case if Princeton University itself had standing. But it does not. The University waits until the very conclusion of its Brief to address this issue. Princeton's entire argument is as follows:

> Princeton was a party to the proceedings below, having accepted the invitation of the Supreme Court of New Jersey to intervene in defendant's appeal. As a party with an interest who is aggrieved by the decision of the court below, Princeton has standing to appeal that decision. The State of New Jersey has also appealed. Brief of Princeton University 25 (citations omitted).

From the previous argument it is obvious that Princeton's last sentence is in error. The rest of the paragraph is equally dubious.

Although one might think that Princeton's strongest claim to being a "party" is the fact that the initial trial before the Princeton Borough Municipal Court was prosecuted by counsel for Princeton University on behalf of the State, pursuant to Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey, the University correctly notes, Princeton Brief 4 ft. 4, that that did not convey status as a party. Instead Princeton claims that it was "invited by the state supreme court to become a party-intervenor in the appeal," Princeton Brief 4. But the letter from the Clerk of the New Jersey Supreme Court to the University Counsel says only that the "Court is hereby inviting Princeton University to intervene in this appeal," J.A. 4a; see also J.S. 5a. How this invitation makes Princeton a party in this *criminal prosecution* is unclear.

Although New Jersey Court Rules, 1969, 4:33-1 and 33-2 provide for intervention, it is obvious that only civil cases are covered by these rules. There is no rule allowing intervention in a criminal case. A letter from the Clerk of the New Jersey Supreme Court is hardly evidence for the proposition that the New Jersey State Supreme Court has decided, in effect, to amend the existing New Jersey Rules of Court by establishing a procedure for intervention by a victim in criminal cases. Although the Court distinguishes, J.S. 5a, between Princeton as an intervenor and the Association of Independent Colleges and Universities in New Jersey as an *amicus curiae*, that distinction is without foundation in existing New Jersey statutory law regulating criminal procedure. Appellee notes as well that the Court's final opinion was captioned *State of New Jersey* v. *Chris Schmid*, J.S. 1a. There is no direct mention of Princeton as a party nor even an "et al." indirectly indicating the presence of third parties.

It would be altogether appropriate for this Court to remand this case to the New Jersey Supreme Court for the specific purpose of its addressing the dimensions of Princeton's status in this case. In the absence of such clarification, there is

certainly no reason for this Court to assume that the New Jersey Supreme Court intended to convey to Princeton University, a private institution, the right to appeal the setting aside of appellee's conviction even if the State could not do so. Indeed, that would be a delegation of sovereign State power over the enforcement of its criminal law.

None of the cases cited by Princeton remotely involves a situation like the instant case,[4] where a private litigant is appealing the setting aside of a criminal conviction. Although the University purports to be "aggrieved by the decision of the court below," Princeton Brief 25, Princeton's grief differs not at all from that of any alleged victim of a crime who is dissatisfied with the decisions of state authorities, whether prosecutors or judges, in regard to the alleged perpetrator of the deed. Were this an ordinary burglary case and the defendant had been ordered freed because, say, the evidence had been seized in violation of the Fourth Amendment, the burglary victim would not have an independent right to appeal, any more than the victim could have forced prosecution in the first place had the public prosecutor determined otherwise.

This case represents the functional equivalent of a private prosecution of the criminal law and is therefore controlled by *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) (emphasis added):

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger* v. *Harris*, 401

---

[4]The cases cited by Princeton in its Brief, at 25 ft. 23, are irrelevant to this case, save perhaps for United States v. Sherman, 581 F.2d 1358 (1978), which involved an attempt by a newspaper to file an appeal following the conclusion of a criminal trial in which the trial judge enjoined the jurors from speaking to anyone, including the press. Although the *Seattle Times* was clearly affected by the order, the Ninth Circuit panel held that it was without jurisdiction to hear an appeal because the newspaper was "not a party to the action below." 581 F.2d, at 1360.

> U.S. 37, 42 (1971); *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962); *Poe* v. *Ullman*, 367 U.S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, *in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution of another.* Appellant does have an interest in the support of her child. *But given the special status of criminal prosecutions in our system,* we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws. The District Court was therefore correct in dismissing the action for want of standing, and its judgment must be affirmed.

At no time in this litigation has Princeton's "nexus" been stronger than that of Linda R.S. She was, after all, being harmed by Richard D.'s alleged failure to pay child support. *Id.* at 618. Although this failure is generally outlawed by Texas criminal law, the prosecutor refused to bring charges against Richard D. on the ground that the statute did not cover fathers of illegitimate children. *Id.*, at 615-616. Linda R.S. argued that the failure to prosecute for that reason violated her child's rights under the Equal Protection Clause. Nonetheless, her interests were not sufficient to generate standing "in the unique context of a challenge to a criminal statute." *Id.*, at 617.

In the instant case, similarly, the State is not prosecuting further the alleged trespass, at least in part, presumably, because its highest court has declared the law invalid as applied. Unlike Linda R.S., Princeton was shown to have suffered no actual harm to any protected interest; indeed, that was one reason for the invalidity of the statute as applied.

In any event, Princeton is not authorized to challenge before this Court the failure of the State of New Jersey to prosecute further appellee Schmid.

C. *The case is moot as between Princeton University and appellee.*

Even if Princeton has party status, there is still no jurisdiction before this Court. Whatever might have once been the case regarding a "nexus between the vindication of [Princeton's] interest and the enforcement of the State's criminal laws," there is at present no nexus at all. The reason is simple: Princeton has amended its internal regulations so as to allow access, subject to suitable time, place, and manner restrictions, to its campus by appellee Schmid and people like him. J.S. 2a ft.2, 33a; Princeton Brief 14. There is therefore no current likelihood of the renewal of the controversy that once existed between Princeton and appellee Schmid. Princeton is in effect seeking an advisory opinion by this Court that its past policy, repudiated now by the University itself, was protected from judicial scrutiny by the New Jersey Supreme Court even when Princeton was attempting to invoke the State's power against appellee. There are many circumstances, of course, where this Court issues declaratory judgments,[5] but it is unprecedented that one be issued in the guise of an appeal by a private litigant of a final judgment in a criminal case where the underlying subject of that case has become moot.

D. *Princeton is without standing to assert the claims of other universities in other settings.*

As if recognizing that it can present no claim before this court that its own interests have been affected by the decision of the New Jersey Supreme Court, Princeton's most passionate arguments in its Brief are made in behalf of universities

---

[5]The fact that Princeton is in reality seeking a declaratory judgment is underlined by contemplating what the result of a reversal of the New Jersey court's decision would be. In a normal criminal case, of course, the result would be the reimposition of the sentence; here, however, the State has not indicated any desire to punish appellee. Even if Princeton has the right to appeal, does it also have the right in effect to fine?

wholly unlike itself, i.e., those universities which choose "to indoctrinate students in a particular ideology or set of beliefs," Princeton Brief 8, as opposed to Princeton's own commitment to the importance of exposing "students to widely different viewpoints," *id.* See also J.S. 30a. Princeton is therefore in effect attempting to represent vicariously those universities which might conceivably raise more plausible objections to the decision of the New Jersey Supreme Court.[6]

In effect, then, Princeton is asserting its standing to demonstrate the "overbreadth" of the New Jersey Supreme Court's decision. But the vicarious representation inherent in the "overbreadth" doctrine is a carefully limited exception to this Court's general teaching:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before this Court. [Citations omitted.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously.

---

[6]The *amicus* Brief filed by the Massachusetts Institute of Technology raises some interesting questions, but none need be considered by the Court in this case. "*Unlike Princeton,* M.I.T. does not permit strangers to engage in any distribution or solicitation activities on its campus. This prohibition is an absolute one, extending to all such activities, regardless of the content of the message or the worthiness of the cause." M.I.T. Brief at 6 (emphasis added). The decision of the New Jersey Supreme Court did not concern universities "unlike Princeton," but Princeton University itself.

Appellee does not concede that *any* residential university could successfully object to the decision of the New Jersey Supreme Court on the First Amendment grounds asserted by Princeton, but it would obviously be a more challenging case were the facts to involve not only M.I.T., but also, say, attempts by Brigham Young University to deny access to a pro-smoking political candidate or by Notre Dame to block access by a pro-abortion group. Such challenges, however interesting, have nothing to do with the instant case and are not before the Court at this time.

> See *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-611 (1973).

The most important exception to this doctrine arises in certain First Amendment cases where the fear is expressed that the unnecessarily broad reach of a given statute will inhibit the speech of third parties that would itself be protected by that Amendment. See, e.g., *Schad* v. *Mt. Ephraim*, ___ U.S. ___, 101 S.Ct. 2176, 2181 (1981). Generally, however, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick, supra*, at 615-616.

One notes that the ordinance at issue in *Mt. Ephraim* "prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." *Mt. Ephraim*, ___ U.S. ___, 101 S.Ct. 2181. The test articulated by the New Jersey Supreme Court, J.S. 27a, however, requires a sharply focused judicial inquiry, one of whose purposes is precisely to safeguard the "generous measure of autonomy and self-governance," J.S. 31a, of universities.

Insofar as the basic rationale for the overbreadth doctrine has always been that speech is fragile and proponents of unpopular ideas too easily "chilled" by fear of having to test the overbroad statute, it would be especially unfitting to allow Princeton standing. Here it is the University which is seeking not to speak, but to censor; there is no evidence that those who would censor the free expression of ideas are so easily chilled that this Court must bend generally accepted principles of constitutional adjudication in order to let their interests be fully protected.

For all of the above reasons, therefore, this case should be dismissed for want of standing by the State of New Jersey, which has no controversy with appellee, or by Princeton University, the only litigant actually challenging the decision of the Court below.

II. THERE IS NO STATE ACTION IN THE CASE SUFFICIENT TO ALLOW PRINCETON UNIVERSITY TO ASSERT CLAIMS UNDER THE FIRST, FIFTH OR FOURTEENTH AMENDMENTS

What Princeton is trying to do is to conduct civil constitutional litigation in the guise of a criminal case. Princeton claims the protection of the Fourteenth Amendment (incorporating the First and Fifth Amendments), Princeton Brief 2, but that Amendment runs, of course, only against state action. *Civil Rights Cases*, 109 U.S. 3 (1883); *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978). But there is no state action, relative to Princeton, in this case, although that point is initially obscured by the purported joinder of the State in this appeal.

If the State is dismissed from this case and it becomes recaptioned as *Princeton University* v. *Schmid*, then Princeton would have to show that appellee Schmid violated its constitutional rights. But Schmid *cannot* violate Princeton's First Amendment rights, for he is a private citizen. The State of New Jersey did not order Schmid to enter Princeton's campus. Although Princeton wishes to entangle Schmid in the web of New Jersey's criminal law, it cannot claim that the Constitution operates directly against appellee. The University admits this when it quotes, for a different purpose of course, a relevant passage from *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976): "Thus, while statutory or common law may *in some situations* extend protection or private redress against a private corporation or person who seeks to abridge the free

expression of others, no such protection or redress is provided by the Constitution itself." *Id.*, at 513, quoted in Princeton Brief 21 (emphasis supplied by Princeton).

Ironically, in the litigation below it was appellee who argued that Princeton University met the state action requirement of *Marsh* v. *Alabama*, 326 U.S. 501 (1946), so as to require recognition of his First Amendment rights of political expression, while the University, relying on cases like *Hudgens*, asserted that, as a private entity, it was free to ignore Schmid's claims. The New Jersey Supreme Court did not resolve Schmid's own First Amendment claims, J.S. 16a, because it decided that the New Jersey Constitution itself prohibited application of state trespass law in the circumstances of this case.

Given this Court's decided case law, had the New Jersey Supreme Court upheld his conviction, it would not have been open to Schmid to argue that the trespass conviction *without more*[7] imputed state action to Princeton's denial of his expressional rights. That presumably is the message of the last two "shopping-center" cases, *Lloyd* v. *Tanner*, 407 U.S. 551 (1972) and *Hudgens*, *supra*. See also *Peterson* v. *Greenville*, 373 U.S. 244 (1963); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); and *Bell* v. *Maryland*, 378 U.S. 226 (1964). If appellee could not claim that his conviction for trespass was "state action" abridging his freedom of expression, then how can Princeton argue that the refusal to convict is state action?

If one recaptions this case as *Princeton University* v. *State of New Jersey*, then Princeton must argue either that the State has an affirmative duty to structure its criminal law to protect Princeton's asserted interests or that the denial of

---

[7]Appellee, had he been convicted and chosen to appeal the conviction to this Court, would have continued to assert his claims under the "public function" doctrine of *Marsh*, but he would not have argued, given the shopping center cases, that Princeton's recourse to state trespass law itself constituted the state action required for vindication of his First Amendment rights.

Princeton's claims itself constitutes state action. Neither proposition is tenable. This Court, in *Flagg Brothers, supra,* spoke directly to this point:

> If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here. . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner. 436 U.S., at 165
>
> Here, the State of New York has not compelled the sale of bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaints is not that the State *has* acted, but that it has *refused* to act. *Id.*, at 166.

For these reasons the Fourteenth Amendment claims initially raised by respondent Brooks were dismissed since the requisite state action to come within the Amendment in the first place was lacking.

Princeton's campus has in no way been touched by the State of New Jersey. The State Supreme Court did not enjoin Princeton to change its rules. It simply announced under what circumstances the protections of New Jersey's general trespass law would be unavailable to Princeton, when, that is, "its courts will not interfere with a private" decision by persons seeking to promote political expression to enter Princeton's campus.

Were this the 42 U.S.C. §1983 case that Princeton is trying to place before this Court, it would be dismissed for failure to state a claim, and the reason is simple: It has not been deprived of anything by the State in a manner sufficient to provide

"state action". The result should be no different in the instant case.

III. "ACADEMIC FREEDOM," HOWEVER MUCH PROTECTED BY THE FIRST AMENDMENT, IS NOT A GENUINE ISSUE IN THIS CASE, AND PRINCETON UNIVERSITY'S INVOCATION OF ABSOLUTE DOMINION OVER ITS CAMPUS IS ALIEN BOTH TO "ACADEMIC FREEDOM" AND TO RELEVANT CASE LAW

Princeton's central argument is laid out in its Brief at p.7:

> Universities, public or private, are so involved with the values which the First Amendment secures from governmental interference as to make "[t]he freedom of a university to make its own judgments as to education . . . a special concern of the First Amendment." *University of California Regents* v. *Bakke*, 438 U.S. 265, 312 (1978). A community of scholars engaged in research and education — the search for knowledge and its dissemination —is central to the purposes of a university and to "the pursuit of truth which the First Amendment was designed to protect." *Adler* v. *Board of Education*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting). Unfettered educational choices are as crucial to the function of a university as the editorial choices of a newspaper. Like a newspaper, and unlike a company town or a shopping center, the property of a University is devoted to expressive purposes and is constitutionally protected from governmentally mandated access. [Citations omitted].

Princeton University's assertion that this case involves the "academic freedom" protected by the First Amendment rests on a wholly distorted understanding of the history and rationale of academic freedom and of the cases protecting that

freedom. No genuine issue of academic freedom is presented by this case.

Princeton University, for all of its erudite asides about Oxford University in the 14th century, Princeton Brief 12-13, has ignored a massive (and easily available) literature detailing the modern history of the concept of academic freedom.[8] See, e.g., Richard Hofstadter and Walter Metzger, *The Development of Academic Freedom in the United States* (1955); Robert MacIver, *Academic Freedom in Our Time* (1955); Laurence Veysey, *The Emergence of the American University* 384-418 (1970); Edmund Pincoffs, ed., *The Concept of Academic Freedom* (1972), especially Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," at 59-85; *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1048-1051 (1968); Louis Joughin, ed., *Academic Freedom and Tenure: A Handbook of the American Association of University Professors* (1969). Awareness of this history makes it clear why Princeton is reluctant to confront it.

Although the initial theory of academic freedom developed in 19th century Germany emphasized the threat of governmental interference in the affairs of the university, see, e.g., Veysey, *supra*, at 384, the American theory quickly recognized that threats to the freedom of unfettered inquiry incarnated in the notion of academic freedom could come from many sources. The stress on governmental interference is understandable in a European context where members of the academy controlled not only their own institutions, but also, at times, the municipality within which the institution was located. This was apparently true, for example, of Oxford University. See Princeton Brief 13 ft. 16; Brief of *amici curiae* American

---

[8] Although this Brief touches briefly on the history of academic freedom, appellee directs the Court's attention to the extensive history of the concept presented in the Brief submitted by *amicus curiae* American Association of University Professors.

Council on Education and the National Institute of Independent Colleges and Universities 19. But this pattern of academic control of academic institutions has not been a feature of the American experience of higher education, which instead has placed our great private universities, including Princeton, under the control of lay Boards of Trustees and Overseers.

A recurrent problem in this country has been the tension between students and faculty, on the one hand, and these lay boards, on the other, over what ideas are suitable for examination. Indeed, Professor Machlup has noted "the fact that, in the brief history of academic freedom in the United States, it has been chiefly from the boards of trustees that pressures have been exerted upon professors." Fritz Machlup, "On Some Misconceptions Concerning Academic Freedom," 41 AAUP BULLETIN 753 (1955), reprinted in Joughin, *supra*, at 182 (1969). For example, one of the most important conflicts over academic freedom in the history of American universities took place at Stanford University in 1903, where the contending parties, in effect, were Professor Edward A. Ross and Jane Stanford, the powerful widow of Stanford's founder Leland Stanford. See Veysey, *supra*, at 400-407. Even though the source of interference was private rather than public, the American Economics Association had no trouble issuing a report accusing Stanford of violating the academic freedom of Ross and other members of the faculty. *Id.*, at 406.

Attacks on academic freedom, therefore, can come from any sector which claims the power to control the ideas welcomed onto a university campus for study and elucidation by its faculty and students. It is this recognition of the multiple sources of threats to academic freedom that led Professor Machlup to offer the following definition of the term:

> Academic freedom consists in the absence of, or protection from, such restraints or pressures — chiefly in the form of sanctions threatened by state or church authorities or by the authorities, faculties, or students of colleges

> and universities, but occasionally also by other power groups in society — as are designed to create in the minds of academic scholars (teachers, research workers, and students in colleges and universities) fears and anxieties that may inhibit them from freely studying and investigating whatever they are interested in, and from freely discussing, teaching, or publishing whatever opinions they have reached. *Machlup, supra,* at 178.

One might be especially fearful of attacks mounted by the state; and, of course, the First Amendment makes those attacks uniquely subject to constitutional challenge. But it totally distorts the meaning of academic freedom (and recognition of threats thereto) to focus on the state as the only threat or to view university trustees or administrators as necessarily the protectors of academic freedom.

Appellee does not deny that private universities may sometimes have a right to limit or even deny academic freedom to their faculty or students. Indeed, the 1940 codification of academic freedom by the American Association of University Professors recognizes as much when it states: "*Limitations of academic freedom* because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment" of a faculty member. Joughin, *supra,* at 36 (emphasis added). It is a disservice to linguistic clarity, however, for attacks on academic freedom to be labeled "academic freedom" itself. Perhaps Humpty-Dumpty had the authority to say that "When I use a word . . . it means just what I want it to mean — neither more nor less." L. Carroll, *Through the Looking Glass* 159 (1871). But not even Princeton University by its own fiat can totally erase an existing understanding of "academic freedom" that totally contradicts the assertions made by the University.

In confusing the concepts of the unrestrained power of university administrators[9] with that of "academic freedom," the University makes it impossible to comprehend the extent to which they are not only different, but sometimes even antagonistic, notions. What is worse, the University asks this Court to acquiesce to its confusion. Acceptance of Princeton's argument would make the sentence, "Stanford University violated Ross' academic freedom," incoherent, in the sense that a sentence referring to a married bachelor makes no sense in our language. But the suggested sentence is meaningful, instantly understood by any competent speaker of our language; this very fact exposes the all-important difference between the unconstrained power of university administrators and genuine academic freedom. It also makes clear how radical and anti-academic freedom Princeton's argument is.

The most recent summary of case law regarding academic freedom is contained in Justice Powell's opinion in *University of California Regents* v. *Bakke*, 438 U.S. 265, 312-313 (1978).

---

[9]Princeton, Brief at 14 ft. 17, and amici ACE-NIICU, Brief at 12, both suggest to this Court that Princeton's regulation barring appellee from campus without (standardless) permission represented a "concensus [sic] reached through a lively and wide ranging internal debate," ACE-NIICU Brief at 13. Three comments are necessary:

1. Not only is there not the slightest evidence in the record to support this description of the origins of the regulation in question, but it also can be demonstrated that the description is mistaken.

2. When the Princeton community did become aware of the regulation, following the initiation of the present prosecution by the University administration, the regulation was changed. See J.S. 2a ft.2.

3. Most importantly, are appellee and this Court to understand that Princeton and the ACE-NIICU seriously mean to suggest that this Court should review the internal decision-making processes of universities, in cases like this one, and come up with different decisions depending on the "liveliness" of the debate or identity of the decisionmakers? It is impossible to believe that Princeton would support such judicial intrusion, but unless that is desired by Princeton then the very discussion by the University of its decision making process is utterly irrelevant to this (or any other) case.

Unlike the University, appellee prefers to quote from that opinion at some length, for Justice Powell's conception, taken as a whole, recognizes fully the integral connection between genuine academic freedom and the commitment to the unfettered examination of all ideas. Concomitantly, it offers no support at all for Princeton's attempt to collapse the distinction between academic freedom and unconstrained university autonomy.

> "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the four essential freedoms that comprise academic freedom:
>
> > '. . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).
>
> Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967):
>
> > 'Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that

robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.' *United States* v. *Associated Press*, 52 F. Supp. 362, 372.'

The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.[48] As the Court noted in *Keyishian*, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."

[Footnote 48 is set forth in full below]

"[48]The president of Princeton University has described some of the benefits derived from a diverse student body:

'. . . [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours once observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

'In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers

> in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.' " Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

Indeed, Justice Powell, speaking for the Court in *Healy* v. *James*, 408 U.S. 169 (1972), wrote of the "college classroom *with its surrounding environs*" as "peculiarly the 'marketplace of ideas,' " *id.*, at 180 (emphasis added). There is thus full recognition that "academic freedom" cannot be understood apart from the theme of maximum exposure of members of a university community to the diversity of ideas available about our complex world.[10]

It requires only a brief survey of the facts of this case to realize that none of the "four essential freedoms" articulated by Justice Frankfurter is at issue in this case. Appellee does not challenge Princeton University's discretion to choose its faculty or to dictate the subject-matter and method of teach-

---

[10]This theme runs throughout the cases involving academic freedom. See, e.g., the statement by Chief Justice Warren:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. *To impose any strait jacket* upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (emphasis added).

Here, of course, it is the University administration that claims the right to impose the strait jacket upon its student body.

For a general review of the case law involving academic freedom, see Ralph Fuchs, Academic Freedom — Its Basic Philosophy, Function, and History, in Joughin, *supra*, at 242-263.

ing. Nor does appellee challenge Princeton's right to choose its own student body.[11]

Appellee does not challenge the right of Princeton University to make "unconstrained philosophical and curricular choices." Princeton Brief 8, citing *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 634-39. Princeton University could limit the views articulated in its classrooms to a single ideology; it can issue statements denouncing the views of appellee and encouraging its student body to have the wit to reject them as well. What Princeton University cannot do —and certainly not in the name of "academic freedom" — is to claim First Amendment protection to operate its campus as an "enclave[ ] of totalitarianism," *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).[12]

There is an exceedingly simple reason why the rights of university administrators cannot extend, with First Amendment protection, so far as Princeton would have them: Princeton University's students are *more* than students. "Students — who by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age — are adults, who are members of the college or university community." *Healy* v.

---

[11]As developed at length in the *amicus* Brief submitted by the AAUP, it should be noted that even these "essential freedoms" are not absolute. "Academic freedom" could not be invoked to defend teaching students about the effects of illegal drugs by allowing class members to take them. Even more to the point, of course, is the legitimate role of the state is assuring that a university's faculty is not chosen by a racially or sexually discriminatory process. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-e 17 (Supp. v. 1975). And the "essential freedom" of a university to choose its own student body has scarcely been unchallenged by this Court. See *Bakke, supra;* see also Runyon v. McCrary, 427 U.S. 160 (1976).

[12]It is true that Justice Fortas was referrring to "state-operated schools," *id.*, but that is only to say that the First Amendment of its own force may not require private schools to be non-totalitarian. Princeton's argument, of course, is that the First Amendment's protection of academic freedom extends to totalitarianism itself.

James, supra, at 197 (Douglas, J., concurring). "Approximately 87% of the [Princeton] student body are citizens of the United States, 18 or over, and therefore eligible to register to vote under the laws of New Jersey or some other state. Approximately 1,500 students are registered to vote in the Borough or Township of Princeton." J.S. 54a. Students may be limited in the classroom as to what they can hear; university administrators cannot claim First Amendment protection to limit voters outside of the classroom as to what they may be introduced to.

Appellee agrees that Princeton University could, if it wished, limit its teaching faculty and student body to registered Republicans and to issue forthright statements of support for the candidates of that party. But it requires a strained reading of the First Amendment to argue, as did Princeton at the oral argument before the New Jersey Supreme Court, that the University could require its students to live on campus and then, limiting entrance to the campus to Republicans, prevent the introduction on campus of non-Republican ideas. That is to deny voting citizens of the United States freedom to interact with their fellow citizens — whether students or outsiders — in discourse about the great issues of the polity, including, of course, the merits of candidates running for office. Princeton's students "are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of the community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored." *Marsh* v. *Alabama,* 326 U.S. 501, 508 (1946). This Court has very recently reiterated that " 'it is of particular importance that candidates" — and, appellee would add, their representatives — "have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.' *Buckley* v.

Valeo, 424 U.S. 1, 52-53 (1976). Indeed, 'speech concerning public affairs is . . . the essence of self-government,' *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). The First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1970)." *CBS* v. *F.C.C.*, ___ U.S. ___, 101 S.Ct. 2813, 2380 (1981). In *CBS* this Court upheld a congressional statute requiring limited access to the facilities of private television networks, stating that the disputed statute "makes a significant contribution to freedom of expression by the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *Id.*

Whether or not appellee is himself protected by the First Amendment in his attempt to gain access to Princeton's campus, a question left unresolved by the New Jersey Supreme Court, J.S. 16a, it cannot be the case that censorship of the sort asserted by Princeton is itself protected by that Amendment from constraint by a State devoted to enhancing "the effective operation of the democratic process." See United States Constitution, Amendment 10; Article IV, Section 4 (guaranteeing a "republican form of government"). The "informational purpose of the First Amendment," *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 782 ft. 18 (1978), prevents the State "from limiting the stock of information from which members of the public may draw." *id.*, at 783. The First Amendment is not violated when a State, as does New Jersey in the instant case, acts to make sure that its citizens or residents will not be limited in "the stock of information" they may receive in order to exercise wisely their duties, "which affect the welfare of the community and nation." *Marsh*, at 508.

In its opinion the New Jersey Supreme Court quoted approvingly the statement of Justice Clifford that "political speech . . . occupies a preferred position in our system of

constitutionally-protected interests. [*State* v. *Miller*, 83 N.J. 402, 411, 416 A.2d 821 (1980).] Where political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" J.S. 22a. The Court went on to add that "the State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights. . . . . Finally, the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well." J.S. 23a.

The Court did not, but it might well have cited this Court's reminder in *Bellotti*, 435 U.S., at 777 ft. 12 (1978), that "[S]elf government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), quoted in *New York Times* v. *Sullivan*, 376 U.S. 254, 266 (1964)." The New Jersey Supreme Court, recognizing that, in a pluralist society like that of the United States, it is not only governmental officials who exercise power, noted that the protections of the New Jersey Constitution "are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." J.S. 24a. Thus Article I, paragraphs 6 and 18, of the New Jersey Constitution sometimes prevents the efforts of those with private power to "suppress competing views on public issues," *Bellotti*, *supra*, and this was one such case.

Princeton's counter to this argument is to emphasize this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which struck down a Florida right-of-reply statute on the ground that it intruded "into the function of editors," *id.*, at 258, protected by the First Amendment's guarantee of freedom of the press.

This Court most recently reflected on the implications of *Tornillo* in *Prune Yard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). *Tornillo* " rests on the principle that the State cannot tell a newspaper what it must print." *Id.* at 88. The proper analogue would be the demand by the State that Princeton teach certain courses. "There is also a danger in *Tornillo* that the statute would 'dampen the vigor and limit the variety of public debate' by deterring editors from publishing controversial political statements that might trigger the application of the statute. [418 U.S.], at 257. *Thus* the statute was found to be an 'intrusion into the function of editors.' *Id.*, at 258. These concerns obviously are not present here." *Prune Yard*, at 88 (emphasis added). There is no plausible argument that universities will be deterred from what Justice Powell correctly recognized as their mission of intellectual debate, *Bakke*, *supra*, at 312-313, by the requirement that outside participants, under suitable restrictions on time, place, and manner, may sometimes be allowed to convey their views to willing student-citizens outside of the classroom or other protected special space of the university.

As the Editors of the *Harvard Law Review* have noted:

> Opening private property to pluralist expression poses none of the dangers that compelled speech doctrine is designed to prevent. The compelled speech cases have held unconstitutional government attempts to create an orthodoxy in matters of opinion. *Wooley* v. *Maynard*, 430 U.S. at 713-15; *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637, 640-42 (1943), attempts to compel speech in support of a particular viewpoint, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and measures that penalize expression, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-57 (1974). These decisions are aimed at actions that 'dampen[ ] the vigor and limit[ ] the variety of public debate.' *See, e.g., id.* at 257 (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

> Such concerns are not present when private property is opened to pluralist expression, because the state is seeking to obtain a forum for all speakers and any point of view.[13]

One might point out, moreover, that the press, even though explicitly protected by the First Amendment, has not been given the *carte blanche* implied by Princeton to determine, without judicial review, what counts as its protected editorial function. That is, the mere statement by the press that its editorial function is impaired has not been enough to conclude litigation in the press' favor. Thus this Court has at least thrice rejected claims of the press that revolved around the alleged threat to the editorial process posed by the application of state laws concededly applicable to the ordinary citizen. See *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978); *Herbert* v. *Lando*, 441 U.S. 153 (1979). See also *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, in which this Court upheld a municipal ordinance prohibiting newspapers from listing job advertisements by sex.

Princeton University claims for itself what this Court has denied not only the press, but even the President of the United States, see *United States* v. *Nixon*, 418 U.S. 683 (1974), the ability to close off judicial inquiry by the utterance of a "talismanic incantation," *U.S.* v. *Robel*, 389 U.S. 258, 263 (1967), whether it be "editorial function," "executive privilege," or "academic freedom." In all of these cases, however, courts exist to examine the cogency of the arguments made. The New Jersey Supreme Court examined Princeton's arguments at length and correctly found them without application to this case.

Appellee notes, moreover, that this Court has upheld access rules in regard to the electronic media in *Red Lion Broadcast-*

---

[13]The Supreme Court, 1979 Term, 94 HARV. L. REV. 171-72 ft. 23 (1980).

ing Co. v. *Federal Communications Commission*, 395 U.S. 367 (1969), and *CBS* v. *FCC*, 101 S.Ct. 2813 (1981). Appellee does not suggest that Princeton University is more like a television station than a daily newspaper, for his principal point is that these metaphors are profoundly irrelevant: Princeton University is neither a television station nor a newspaper. Appellant is a great private university on whose grounds its employees work and students live. Presumably Princeton's status as a university would not authorize it to deny access to union organizers acting under the authorization of the National Labor Relations Act or relevant state law. See, e.g., *Hudgens* v. *NLRB*, 424 U.S. 507 (1976); *Scott Hudgens*, 230 N.L.R.B. 414 (1977); Holland Rantos Co., 234 N.L.R.B. 726, *enforced* 583 F.2d 100 (3d Cir. 1978); *Eastex, Inc.* v. *N.L.R.B.*, 437 U.S. 556 (1978).

Princeton University requires over 3000 student-voters to live on its central campus, see Stipulated Facts D, J.S. 52a-53a, and 12, J.S. 59a, and that reality controls this case just as much as its status as an employer would control if this case concerned access to its employees. There is an overwhelming public interest in maximizing the free flow of information to voters to that they may cast their votes wisely, and States are entitled to withhold access to its trespass law by owners of private property, in certain circumstances, who do not take account of this interest.

Given the overwhelming nature of the public interest at stake, one would expect that Princeton could point to some substantial injury to its own interests sufficient to override those of appellee and the public. Not the least remarkable aspect of this case, however, is that Princeton throughout this entire litigation has never pointed to the slightest way in which access to its grounds by appellee, limited by suitable time, place, and manner restrictions, would infringe the operations of the University. In the press cases cited above, the newspapers at least presented plausible arguments that enforcement of the law would in fact affect their internal operations.

Here, on the contrary, Princeton is asserting an absolute freedom, unfettered by the need to present concrete argument, to exercise mastery over its campus.

The best evidence that appellee's access to the Princeton University campus does not infringe the University's operation is the fact that Princeton, subsequent to the initiation of this prosecution, changed its rules to allow access, subject to time, place, and manner restrictions. J.S. 2a ft. 2; Princeton Brief at 14. What Princeton wishes to argue is that that change was a matter of grace rather than a recognition of appellee's rights under the New Jersey Constitution, but surely the more central point is that Princeton is wholly without credibility (even if not legally estopped) in arguing that the decision of the Court concretely hinders the operations of the University.

For this Court to uphold the validity of the decision of the New Jersey Supreme Court does not in the least require cutting back on the First Amendment protection accorded academic freedom. That Court itself emphasized "giv[ing] substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain." J.S. 31a. But the Court rightly found that, given the circumstances of this case, all of Princeton's legitimate interests could be met by time, place, and manner restrictions of the kind subsequently adopted by the University, J.S. 33a.

The approach of the New Jersey Supreme Court was very similar to that adopted by this Court in the recent case of *Schad* v. *Mt. Ephraim*, ___ U.S. ___, 101 S. Ct. 2176 (1981), dealing with a municipal ordinance prohibiting live entertainment within the boundaries of the community:

> [T]he initial question in determining the validity of the exclusion . . . is whether live entertainment is 'basically incompatible with the normal activity [in the commercial zones.]' As discussed above, no evidence has been presented to establish that live entertainment is incompatible with the uses presently permitted by the Borough. Mount Ephraim asserts that it could have chosen to eliminate all commercial uses within its boundaries. *Yet we must assess the exclusion of live entertainment in light of the commercial uses Mount Ephraim allows, not in light of what the Borough might have done.* 101 S. Ct., at 2186 (emphasis added).

Similarly, the New Jersey Supreme Court looked not at what kind of educational philosophy Princeton University *might* adopt, but to the one it has adopted and professes. Thus the Court quoted Princeton's President William G. Bowen on "The Role of the University as an Institution in Confronting External Issues":

> Central to the philosophy of education is the proposition that the University has a responsibility to expose students and faculty members to a wide variety of views on controversial questions. . . .
>
> Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking, here about something that is merely desirable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society — a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint of [sic] the loneliest dissenter, is encouraged to think independently. J.S. 30a.

The essence of this notion of the University is that it does not express judgment about the merit of particular ideas so much as embrace the values of intellectual inquiry and self-examination as ends in themselves. The very purpose of the University, from this point of view, is therefore the free expression of ideas. One might contrast this not only with alternative conceptions of universities as places devoted to the inculcation of specific dogma, but also with such contemporary institutions as shopping centers, whose central purpose is commercial transactions. Yet even in this last case, this Court emphasized that California's decision that a shopping center could not use state trespass law to keep political speech out of a shopping center did not "unreasonably impair the value or use of [the] property as a shopping center." *Prune Yard Shopping Center* v. *Robins*, 447 U.S., at 83. With Princeton University, though, there can be no conceivable impairment of its use of its property, in the circumstances of this case, since Princeton's own designation of its purpose is to serve as a milieu for freedom of thought and expression.

Even if appellee misconceives Princeton's central purpose, and the University should profess itself uncomfortable with the substantive views expressed by appellee or other outsiders, its remedy is not invocation of the State's trespass law, but a simple disavowal of "any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Prune Yard* at 87.

Even if one assumes, contrary to fact, that state action is present, Princeton's claims to the protections of the First Amendment are wholly without merit. Perhaps other cases will genuinely call on this Court to balance the legitimate First Amendment rights of academic freedom or freedom of ideological association against interests asserted by the State. But

this case certainly does not, for Princeton University presents no interests that weigh at all, and the interest of the State that its law not be used as an instrument of stifling the freedom of its citizenry to engage one another in "consult[ation] for the common good," New Jersey Constitution, Article I, para. 18, is overwhelming.

IV. THE STANDARD ARTICULATED BY THE NEW JERSEY SUPREME COURT IS CLEAR AND SURVIVES ANY TEST ESTABLISHED BY THE "VOID-FOR-VAGUENESS" DOCTRINE.

The final argument of the University is that the New Jersey Supreme Court's three-part test, which requires future litigation to take into account "(1) the nature, purpose, and primary use of such private property, generally its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property," J.S. 27a, is "so vague and uncertain as to leave almost unbounded discretion in determining whether particular activities are 'discordant' or 'incompatible' with 'Princeton University's professed educational goals [and] the University's overall use of its property for educational purposes,' (JS 29a-30a). The application of such a vague and uncertain standard is clearly impermissible in this sensitive First Amendment area." Princeton Brief 16.

The first odd feature about Princeton's argument is that it is directed at a standard interpreting the New Jersey Constitution rather than at the Constitution itself. Presumably the University is unwilling to argue that either Article I, paragraph 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty

of speech or of the press . . . .") or Article I, paragraph 18 ("The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances") is itself unconstitutionally vague. *Compare* United States Constitution, Amendment I.

The standard enunciated by the New Jersey Supreme Court is not a statute — the usual subject of vagueness analysis — but rather a set of guidelines for future courts to follow as they balance New Jersey's sometimes competing commitments to freedom of speech, private property, and university autonomy. Indeed, the test established by the court below is quite close to that articulated by this Court in *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972):

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

It was this test that the court applied in *Schad* v. *Mt. Ephraim*, ____ U.S. ____, 101 S.Ct. 2176 (1981).

The New Jersey Supreme Court's test does require the exercise of judgment, as do the various tests enunciated by this Court in regard to the First Amendment. And the New Jersey test requires sensitivity to the actual realities of the situation, as did the application of the *Grayned* test in *Mt. Ephraim*, where this Court "assess[ed] the exclusion of live entertainment in light of the commercial uses Mount Ephraim allows, not in light of what the Borough might have done." *Mt. Ephraim*, *supra*, at 2186. That neither the New Jersey Supreme

Court nor this Court purports to apply mechanical tests does not, except within the ordinary uncertainties of human language, make those tests vague.

> "'[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation,' *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 91 (1977), quoting *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). Performance of this task requires a particularized inquiry into the nature of the conflicting interests at stake. . . . " *Metromedia, Inc.* v. *City of San Diego*, 49 Law Week 4928 (July 2, 1981) (plurality opinion).

Princeton's argument in fact boils down to its objection that the New Jersey Supreme Court behaved like a court, carefully assessing the claims of the competing parties and articulating a standard requiring equally careful assessment, instead of simply accepting the University's unprecedented and insupportable claim to absolute autonomy. Princeton opposes such "particularized inquiry," of course, because such inquiry reveals the total lack of incursion on any genuine interest of the University. As in *Mt. Ephraim*, "no evidence has been presented to establish" that appellee Schmid's political expression "is incompatible with the uses presently permitted" by the University. 101 U.S., at 2186.

A primary use of the "void-for-vagueness" doctrine is to prevent criminal punishment applying a statute where persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). See Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). In recent years the doctrine has been used to strike down laws affecting speech for fear that persons wishing to engage in protected speech will be chilled by a vague statute. See, e.g. *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Smith* v. *Goguen*, 415 U.S. 566 (1974); *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976). But

Princeton obviously does not face any risk of criminal prosecution, nor can Princeton claim in any cogent way that it is being chilled in asserting its views to the public. Indeed, Princeton's claim has nothing to do with speech. The University does not wish to speak against appellee Schmid, but rather to invoke the powers of the State to force him off Princeton's campus and thus prevent him from conveying his political views to willing student-voter listeners. It is hard to think of a case with less of a justifiable claim to the protection of the vagueness doctrine.

Princeton University has thus made no showing that any First Amendment interests it may concededly have are implicated by the decision of the New Jersey Supreme Court in this case.

V. THE STATES ARE FREE TO PROTECT INDIVIDUAL LIBERTIES EVEN WHERE THE FIRST AMENDMENT ARGUABLY DOES NOT, AND THE NEW JERSEY SUPREME COURT'S CONSTRUCTION OF ITS OWN CONSTITUTION VIOLATES NO RIGHT OF PRINCETON UNIVERISTY

Once it is recognized that Princeton asserts no plausible First Amendment claims in the circumstances of this case, then it is obvious that this case is squarely within *Prune Yard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), where the Court emphasized "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by Federal Consitition." *Id.*, at 81. See also U.S. Constitution, Amendment 10. Indeed, it would be an anomaly if a constitutional system which rests on the sanctity of the republican form of government, U.S. Constitution, Article IV, Section 4, did not authorize the States of the Union to exercise special care to preserve that form of government. That, of

course, is what the New Jersey Supreme Court did in the decision below, following the teaching of *Prune Yard*.[14]

Princeton attempts to distinguish *Prune Yard* by pointing to differences between a university and a shopping center. One of these differences, the commitment of universities to activity itself at times protected by the First Amendment, has been examined at length above and has been found to be without merit in the circumstances of this case. Indeed, an additional difference between Princeton and a shopping center is precisely the commitment of the former to providing a forum for unfettered intellectual discourse and examination of ideas. But there is at least one more crucial difference between Princeton and the PruneYard Shopping Center: No one lives at the PruneYard, whereas over 3000 student-citizen-voters are required to live, as well as work, on the University campus. J.S. 52a, 59a. New Jersey can thus honor its commitment to the priority of political speech, J.S. 22a, by withdrawing from a residential university, in the circumstances of this case, the

---

[14] The Supreme Court of Pennsylvania has joined the Supreme Courts of California and New Jersey in reaching a similar conclusion in regard to the Pennsylvania Constitution. Commonwealth of Pennsylvania v. Tate (July 14, 1981) reversed the conviction for "defiant trespass" of six persons who had peacefully distributed leaflets outside of a Muhlenberg College building in which Clarence Kelley, then director of the F.B.I., was speaking at a public symposium on crime prevention. The Court construed Article I, section 20 of the Pennsylvania Constitution, which gives citizens "a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance," to prevent invocation of Pennsylvania's trespass law in the circumstances of the case. After citing the New Jersey Supreme Court's decision in the instant case, the Pennsylvania Supreme Court went on to state, "Mindful of both this Commonwealth's great heritage of freedom and the compelling language of the Pennsylvania Constitution, we likewise hold that, in certain circumstances, the state may reasonably restrict the right to possess and use property in the interest of freedom of speech, assembly, and petition." Typed opinion, p. 14.

right to invoke New Jersey's general trespass law against appellee.

The New Jersey Supreme Court engaged in a thoughtful balancing of the rights of the parties and declared that New Jersey's "own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property," J.S. 27a, required that the balance be struck in favor of appellee's freedom of speech. Perhaps members of this Court, like the administration of Princeton University, disagree with the merits of New Jersey's traditions, but there is no warrant, in a Federal system, for overturning that assessment in the absence of a clear requirement from the United States Constitution that New Jersey be thus fettered.

No such requirement exists. Princeton's task is not to try to invoke Federal power where it is illegitimate to do so, but to try to convince the people of New Jersey of the unsoundness of their own traditions and consequent desirability of amending their constitution. It should go without saying that the First Amendment does protect Princeton in *that* effort, at least against infringement by the State.

Conclusion

For each of the reasons set forth above, the Court should dismiss this case for want of jurisdiction or, in the alternative, affirm the decision of the New Jersey Supreme Court.

Respectfully submitted,

Jerrold Kamensky
Counsel of Record
Tomar, Kamensky, & Smith, P.A.
194 South Broad Street
Trenton, New Jersey 08608
For the American Civil Liberties
Union of New Jersey

Sanford Levinson
University of Texas Law School
727 East 26th Street
Austin, Texas 78705
For the American Civil Liberties
Union of New Jersey
Attorneys for Appellee Chris Schmid

Of Counsel

Douglas Laycock
University of Texas Law School
727 East 26th Street
Austin, Texas 78705